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No. 95-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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The Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer [1] respectfully submit this Reply to the Brief For the Respondent in Opposition to the Petition For Writ of Certiorari.

ARGUMENT

The government implies (Opp. at 7-9) that the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), resolved the constitutional issues relevant to this case. Respondents do not deny, however, that this Court in *Buckley* expressly reserved the question of whether § 441a(d)(3) of the Federal Election Campaign Act, on its face violates the First Amendment. *Id.* at 59, 60 n.67. Moreover, the government intimates (Opp. at 11) that this Court affirmed the constitutionality of § 441a(d)(3) in *FEC*

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[1] The petitioners will be referred to collectively as "Colorado Party" or "Party."

v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981). That case, however, did not involve a constitutional challenge to the statute. Rather it upheld a purely administrative determination made by the Federal Election Commission. Thus, the statement that "[t]he decision of the court of appeals is not in conflict with any decision of this Court or of any other court" (Opp. at 7) with respect to the constitutionality of § 441a(d)(3), is accurate only because this case, for the first time, squarely presents a First Amendment challenge to the constitutionality of § 441a(d)(3).

The issue reserved by *Buckley* is important. The limits of § 441a(d)(3) apply to every political party. As a result, during the nearly twenty years since *Buckley*, this statute has infringed, without review, on the rights of all political parties which make expenditures on behalf of candidates who associate with them. The validity of such a broadly applicable restriction should be reviewed by this Court.[2]

[2] Contrary to the government's suggestion (Opp. at 13 n.5), respondents squarely argued to the court of appeals that the FEC's interpretation was entitled to no deference. *See* C.A. Reply and Opposition Brief for Appellants, pp. 25-33. Respondents also argue (Opp. at 13) that the issue of deference to FEC advisory opinions has been resolved. It has not. Indeed, respondents' Opposition does not address the fact that the FEC issued inconsistent advisory opinions to which the circuit court deferred. Moreover, the cases relied upon by the government are inapt. In *FEC v. Ted Haley Congressional Committee*, 852 F.2d 1111, 1115 (9th Cir. 1988), the agency relied upon a regulation on point and the advisory opinions it issued were consistent. Furthermore, in *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986), the court noted that it had "been unable to locate any FEC advisory opinion . . . that sets forth the FEC's specific reason for adopting the interprtation at issue. . . ."

Thus, the fact that the circuit court relied upon these inconsistent advisory opinions and that they invoke a rule of law is squarely before this court. Finally, respondent's reliance on cases involving other agencies have no bearing on this matter which is unique to the FEC's enabling statute. This is an important issue to be resolved by the Court.

Lastly, during the entire ten year course of this proceeding, the FEC has maintained that it "made no finding distinguishing between Wirth Facts #1 and the other advertisements cited in the [administrative] complaint", C.A. App. 266; *see also* C.A. 323-24. Before the trial court and the court of appeals, the FEC could not and did not distinguish the advertisements. Only in this Court, in response to petitioner's vagueness challenge, does the government offer a "clearly relevant" distinction, (Opp. at 5 n.2 & 17 n.7), and opine that "[u]nlike the other advertisements in question, 'Wirth Facts #1' expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements." Opp. at 17, n.7. This *post hoc* rationalization by appellate counsel, never endorsed by the FEC, cannot be relied upon in this Court. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Moreover, when the advertisements are examined it is evident that all of them attacked the integrity of Tim Wirth's campaign statements, they just used different words to do so. Section 441a(d)(3) as construed below by the court of appeals and now applied by government counsel, does not distinguish between the advertisements with the precision, clarity and predictability that the First Amendment demands. *See Buckley*, 424 U.S. at 41, n.48.

CONCLUSION

In sum, this case presents important issues of law which must be resolved. For the above reasons and the reasons set forth in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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